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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NORTHERN PIPELINE CONSTRUCTION CO.,
Appellant

v.

MARATHON PIPELINE CO.
and UNITED STATES,
Appellees

UNITED STATES,
Appellant

v.

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and NORTHERN PIPELINE CONSTRUCTION CO.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

BRIEF FOR AMICUS CURIAE BENEFICIAL CORPORATION IN SUPPORT OF APPELLEE

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INTEREST OF AMICUS CURIAE

Beneficial Corporation, through one of its subsidiaries, Beneficial Finance of Kansas, Inc., has a cross-appeal pending in this Court raising an issue closely related to that presented here. No. 81-184. Resolution of the issue here may resolve the question raised in No. 81-184.

SUMMARY OF ARGUMENT

The issue before this Court—the authority of Congress to take judicial power of the United States from courts of the United States, constituted as such in conformity with Article III of the Constitution, and to vest that judicial power in persons and tribunals which are *not* courts or judges of the United States under the Constitution—is of profound importance to the constitutional structure of our national government. Our Constitution is based upon the principles of a secure, independent

federal judicial system, and upon the separation of powers between the judiciary, on the one hand, and the executive and legislative authorities, on the other.

We recognize the difficulty of the problem in general. Such difficulties, however, both require resort to and are clarified by first principles. Such resort shows that the creation of a system of courts, outside of Article III, to exercise powers of the scope and nature of the adjudicatory system in the Bankruptcy Reform Act of 1978, clearly violates our Constitution; it is a fundamental, and alarming, departure from the principle that within the states the essential judicial power of the United States may be vested only in courts and judges that have the independence from the legislative and executive, and from the winds of politics and public and private pressures, that is assured by Article III of the Constitution.

As we shall show, the fact that this is "bankruptcy" legislation does not salvage or excuse the provisions of the Act. We know of no way—no process of logic, no ingenious carving of principle—by which a decision sustaining the constitutionality of the so-called Bankruptcy Judge's exercise of jurisdiction in the present case, can be confined to the "bankruptcy" context. The government's brief so acknowledges (Brief of the United States ("Br. U. S.") at 22-23). To be sure, the "bankruptcy" power is vested in the federal government pursuant to Article I, Section 8 of the Constitution; but so are most of the powers of Congress upon which the judiciary acts. Practical reasons, such as the government advances here, can be advanced for transferring the exercise of judicial power from the federal district courts to politically vulnerable "legislative" courts in every other area: patents, antitrust cases, admiralty, securities litigation, etc.; and often, as in the present case, we must anticipate that the transfer will be so extensive as to far exceed the proclaimed need.

The Brief of the United States sweepingly asserts, as it must to sustain its position in the present case, that "Congress

may establish such [Article I] courts in furtherance of a specific Article I power when there is a particularized need for a specialized court" (*Id.* at 22). Any qualification thought to inhere in such a formulation is of cold comfort for, as the government urges, the decision of the Congress as to the existence of a "particularized need" is entitled to substantial weight. (*Id.* at 39 n. 26). The only area of federal court jurisdiction that the government suggests might be immune from transfer to the authority of the legislative branch is "diversity jurisdiction" (*Id.* 22.). The government's submission, therefore, is that this Court should validate a license to the Congress to withdraw jurisdiction from the federal district courts over whatever "specialized" areas it sees fit, and to vest such jurisdiction in politically vulnerable, non-constitutional judges. The use of such authority—if it is given to the Congress—may, from time to time, be irresistible: it would result in multiplying the frequency of Presidential appointments and Senatorial patronage; it could be an easy response to public complaints about unpopular federal court decisions.

This is a case of first impression. Never before has Congress attempted such a bold incursion into Article III's traditional realm. As we shall discuss, the cases relied on by the government—courts in the territorities, or in the District of Columbia, or which involve controversies with the United States in its sovereign capacity and within the exclusive discretion of Congress or the Executive—did not involve legislation challenging the central function and purpose of Article III, and cannot be used as an excuse to vitiate the protections of that Article.

ARGUMENT

The Act Unconstitutionally Constitutes Courts and Judges in Whom Is Vested the Judicial Power of the United States, Without Compliance With Article III of the Constitution.

The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 *et seq.* (the "Act") established "United States

Bankruptcy Courts" which, with insignificant exceptions, possess all the powers of the federal district courts and, indeed, certain powers they do not possess. The judges created for these new Bankruptcy Courts now exclusively hear and determine all bankruptcy and related matters which throughout our history have been heard exclusively by or under the control and supervision of the federal district courts. *See, e.g.* 28 U. S. C. § 1471(e). However, unlike federal district judges and contrary to Article III's express command, the tenure of the new bankruptcy judges is expressly limited to a term of years, and their compensation is subject to diminution. Congress and the President control reappointment and salary. 28 U. S. C. §§ 152-154.[1]

Congress may not pass bankruptcy laws which conflict with the specific commands about the exercise of judicial power found in Article III of the Constitution. As with many of its powers, Congress derives its power to pass "uniform laws on the subject of bankruptcies" from Article I, Section 8.[2]

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[1] Under the Act bankruptcy judges appointed in 1984 will serve 14 year terms. Bankruptcy Act, Public Law No. 95-598, Title IV, 28 U.S.C. §§ 152, 153. During the transition, the existing referees are empowered to act and their terms are extended through March 31, 1984. Title IV, § 404(a)(b), 92 Stat. 2683. Each was appointed by a district judge for a six year term. 11 U.S.C. §§ 61, 62 (1976). Compensation is keyed to the Federal Salary Act, which allows for diminution. 28 U.S.C. §§ 153, 154.

[2] Article I Section 8 provides, *inter alia:*

> "Congress shall have Power . . . to regulate commerce . . . among the several states . . [and] to establish a uniform Rule of Naturalization, a uniform laws on the subject of Bankruptcies throughout the United States."

The power to prescribe uniform laws on the subject of bankruptcy, however, is not unlimited. It does not allow Congress to dispense with specific Constitutional limitations on the exercise of government power, such as due process of law or the requirement of just compensation for the taking of private property for a public use. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 55 S. Ct. 854 (1935). No more does the power allow Congress to dispense with the provisions of Article III designed to protect the independence of the federal judiciary. To say otherwise would create an absurdity—that what Article III denies to Congress, Congress can circumvent through Article I.[3]

I. THE BANKRUPTCY REFORM ACT VESTS THE "JUDICIAL POWER OF THE UNITED STATES" IN AN "INFERIOR COURT" LACKING THE TENURE AND SALARY PROTECTIONS ARTICLE III REQUIRES.

The question whether Congress can properly establish the new bankruptcy courts, which do not conform to Article III,[4] turns on two issues: (1) whether these bankruptcy courts are

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[3] *See* Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional*, 70 Geo. L. J. 297, 305 (1981) ("Congressional action under article I is always subject to limits imposed by other provisions of the Constitution.").

[4] Article III of the Constitution provides:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . .

"inferior courts", and (2) whether they have been vested with "the judicial Power of the United States" as defined in Article III, Section 2. The answer to both questions is unquestionably in the affirmative. Indeed, the government and appellant do not appear to seriously challenge those conclusions, as they could hardly do.

a. The Act Creates Courts and Judges Possessing a Full Panoply of Judicial Powers

Without doubt, in the Bankruptcy Reform Act of 1978 Congress created and intended to create courts and judges without constitutional protections but with full Judicial authority and powers indistinguishable from those of Article III judges and courts.[5] The *only* limitations on the powers of the bankruptcy judges are that (a) they may not enjoin other courts; and (b) they may not punish a criminal contempt not committed in the presence of the judge or warranting imprisonment (although their civil contempt powers are unlimited by the Act).[6]

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[5] Any distinctions between the new bankruptcy judges and constitutional judges are expressly obliterated. The new bankruptcy courts are "courts of the United States" and the new bankruptcy judges are "judges of the United States." 28 U.S.C. § 451. Provisions of the United States Code empowering courts and judges of the United States, including the All-Writs provision, accordingly apply. 28 U.S.C. § 1651. The new bankruptcy judges are members of the Judicial Conference of each circuit, with two to participate in the Judicial Conference of the United States, 28 U.S.C. §§ 331, 333. A retired bankruptcy judge may be assigned to perform "such judicial duties within the circuit" as he is willing and able to undertake, 28 U.S.C. § 294(c), including duty on "a court of appeals or district court." 28 U.S.C. § 294(d). *Cf. also* 28 U.S.C. § 295.

[6] Even these minor limitations appear to have already been subsequently breached or dispensed with. The Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq.*, requires removal of all actions filed under that Act to the local bankruptcy court, which then, without qualification, is vested with "all of the jurisdiction, powers, and duties conferred" under that Act upon the district court. 15 U.S.C. § 78eee(4).

Contrary to the government's suggestions, these courts are not administrative agencies or "analogous" to them.[7]

b. The Bankruptcy Courts Are Not "Administrative".

In view of the government's attempted analogy of the bankruptcy courts to an administrative agency (Br. U. S. at 33-37), it is a striking fact that the Reform Act strips the bankruptcy judge of the "administrative" functions of the prior referees and reposes those functions in the trustee *See, e.g.*, 11 U. S. C. §§ 323, 327, 343, 363, 364. This was a prime goal of the Act. Report of the House Subcommittee on Civil and Constitutional Rights for the Committee of the Judiciary, H.R. Rep. N.95-595, 95th Cong. 1st Sess., *reprinted in* [1978] *U.S. CONG. & ADMIN. NEWS* 5968 ("House Report") at 3-4. The bankruptcy judges are precluded from participating in various "administrative" functions for the purpose of avoiding activities that might be inconsistent with their judicial role. For example, the bankruptcy judges may no longer attend creditors' meetings or meetings of equity securities holders (11 U. S. C. § 341(c));

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[7] A short recital demonstrates the essential judicial nature of the new bankruptcy courts and also how completely they have been vested with the powers of the district courts. Thus, under the Act:

a. The bankruptcy court "shall have the powers of a court of equity, law, and admiralty," with the minor reservations noted above. (28 U.S.C. § 1481.) Its judgments are final subject only to appellate review.

b. The bankruptcy court has ample power to enforce its judgments; it may award damages, order specific performance, levy execution, issue injunctions, grant declaratory judgments (28 U.S.C. § 2201), and impose civil contempt judgments.

c. The bankruptcy judge is given the right to hold jury trials. (28 U.S.C. § 1480.)

d. A bankruptcy court may issue a writ of *habeas corpus* to bring a person before the court "to perform a duty imposed on such person under this title," or for examination, or to testify, or to order release of a debtor imprisoned under judgment "of a Federal or State court" if he was imprisoned on process in a civil action. (28 U.S.C. § 2256.)

absent objection, notice and contest, they may no longer scrutinize claims, or participate in formulating plans or supervising or controlling sales of property of the estate or the incurring of obligations by the trustee or debtor-in-possession. (11 U. S. C. §§ 502, 363, 364). As the House Report pointed out:

> These changes in the present bankruptcy administration system will accomplish the separation of judicial and administrative functions currently performed by the bankruptcy judges. The judges will become passive arbiters of disputes that arise in bankruptcy cases. The United States trustees will assume the bankruptcy judges' current supervisory roles over the conduct of bankruptcy cases and over individuals serving in the bankruptcy system. *Id.*, at 107.

In short, the bankruptcy judges are to function as judges, and solely as judges, indistinguishable from Article III judges.

c. The Bankruptcy Courts Are Not "Specialized".

The word "specialized" with respect to the new bankruptcy courts appears on virtually every page of the Government's Brief. (Br. U.S. at 9, 10, 13, 14, 15, 20, 21, 22, 23, 25, 26, 27, 31, 33.) The truth is the opposite. The range of matters encompassed within the sweep of the jurisdiction of the new bankruptcy courts shows they fully displace the district courts across a wide expanse of the normal jurisdiction of the district courts.

The Act confers upon the bankruptcy courts jurisdiction "of all civil proceedings arising under title 11 or *arising in or related to* cases under title 11." The meaning and scope of this provision is made clear in 28 U. S. C. §§ 1471, 1473, 1474, and 1478. The Act gives the bankruptcy courts jurisdiction over what would otherwise be state, as well as federal, actions. Suits between third parties › which the debtor or trustee is *not* a party may be included if they are "related to" the case in bankruptcy (for example, if the debtor may be liable as guarantor or for indemnity or contribution; or if the debtor is a member of the plaintiff or defendant class).

The suits may have been pending before an Article III judge for a long time. Discovery may have taken place, as in the present case. No findings or any showing are required to justify the bankruptcy court taking jurisdiction over "related" cases, or removing cases to itself. Its decision to take jurisdiction, to abstain or not to abstain, or to remand or refuse to remand a case is final—"is not reviewable by appeal or otherwise." (28 U. S. C. §§ 1471, 1478).

The vast scope of the cases which will thus be swept into these non-constitutional "courts" encompasses the entire *corpus juris*, state and federal: antitrust, securities, commodities, tax (except tax cases in the United States Tax Court), contracts, torts, divorce, alimony, mechanic's liens, personal injury, employee discrimination, etc. 28 U. S. C. §§ 1473, 1478 & 1474[8] Indeed, the Act goes so far as to provide that the jurisdiction of the bankruptcy courts shall attach "*Notwithstanding any Act of Congress* that confers jurisdiction on a court or courts other than the district courts." (28 U. S. C. § 1471(b)).[9]

In view of this fantastic sweep, far exceeding any possible specialization of bankruptcy courts and judges, skepticism is indeed in order as to the alleged justification or "particularized need" for this bold supersession of the judiciary and the subversion of Article III and our constitutionally ordained

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[8] As the House Report admitted:

> The bankruptcy court's general jurisdiction and broad judicial powers make it a true court, unlike specialized administrative tribunals. To the extent that it is a specialized forum, its specialization is unlike that of the Tax Court, where primarily issues under the Internal Revenue Code are decided; or of the Customs Court, or Court of Customs and Patent Appeals, where the range of issues is similarly limited. *House Report*, at 32.

[9] And the concept of "bankruptcy" itself has expanded far beyond its original limitation to involuntary proceedings against "traders". As Professor Charles Warren has stated, "The expansive possibility of [the Bankruptcy Clause of the Constitution] has been one of the most interesting features in the application of our Federal Constitution". Warren, *Bankruptcy in United States History*, (1935), Foreword.

judicial system. Although in any event not justifying disregard of Article III, we doubt that the bankruptcy judges have or will have more special expertise with these matters than the state and federal judges; indeed, no qualifications, not even legal training, are stated for these bankruptcy judges.

d. The Bankruptcy Courts Do Not "Centralize" Bankruptcy Matters.

The government argues that considerations of efficiency in the centralization of all matters related to a bankruptcy in one court justify the Act. Centralization would not require ignoring Article III. But the argument is belied by the facts anyhow. The Act requires that a broad range of cases, including as a practical matter the most extensive types, *must* be commenced in the bankruptcy court for the district where venue would have been proper under applicable nonbankruptcy provisions, 28 U. S. C. § 1473(b)-(e). And removal of a pending "related" civil action is "to the bankruptcy court *for the district where such civil action is pending.*" 28 U. S. C. § 1478(a). Thus, contrary to the government's suggestion (Br. U. S. at 27-31), considerations of efficiency in the centralization of bankruptcy and related cases is *not* a justification for the new bankruptcy court system. Trustees in bankruptcy will still have to travel to remote forums. The net effect of the Act, plainly stated, is to constitute the non-Article III bankruptcy courts and judges as a separate, comprehensive judicial system at the trial level and even, where separate appellate tribunals of bankruptcy "judges" are created, 28 U. S. C. §§ 160, 1482, at the appellate level. The fact that the new Act does *not* centralize litigation in one bankruptcy court starkly reveals that its true purpose is *not* to facilitate disposition of all claims affecting the bankrupt in a single forum, but to create a system of courts circumventing, paralleling, and displacing the federal district court system.

e. This Case "Arises Under" Federal Law And Is Within The Judicial Power Defined In Article III.

Clear as it is that a fully empowered "inferior court" exercising "judicial Power" has been created here, it is also clear that the matters assigned to it "arise under" federal law.[10] The adversary complaint that is the subject of this proceeding is based on the Reform Act and seeks an adjudication of the rights of the debtor under the provisions of that Act. The case, therefore "arises under" the laws of the United States. *Gully* v. *First National Bank in Meridian*, 299 U. S. 109, 57 S. Ct. 96 (1936); *American Well Works Co.* v. *Layne S. Bowler Co.*, 241 U. S. 257, 260, 36 S. Ct. 585 (1916); *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 381, 79 S. Ct. 468 (1959) (Brennan, J., concurring in part, dissenting in part).

Although Congress derives from Article I its power to pass uniform laws on bankruptcies, like its power to pass laws involving interstate commerce, its power to make such a law the basis for jurisdiction in an "inferior court" of the United States derives solely from Article III. A contrary view, advanced by Justice Jackson, speaking for himself and two others, in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582, 69 S. Ct. 1173 (1949), was categorically repudiated by six members of the Court. As Justice Rutledge, concurring in the judgment, wrote:

> Nor is there merit in the view that the bankruptcy jurisdiction of district courts does not stem from Article III. Of course, it is true that Article I is the source of congressional power over interstate commerce, taxation, the coining of money, and other powers confided by the states to the exclusive exercise of the national legislature. But, as Mr. Justice Frankfurther's opinion [dissenting from the judg-

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[10] Article III, Section 2 of the Constitution provides that the "judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States . . . . "

> ment] makes clear, Federal court adjudication of disputes arising pursuant to bankruptcy and other legislation is conventional Federal-question jurisdiction and no case cited in today's opinions remotely suggests the contrary. 337 U. S. at 611.[11]

Justice Jackson's suggestion, urged here again by the government, that bankruptcy jurisdiction arises under Article I, is also refuted by the long history, going back 180 years, of vesting bankruptcy jurisdiction in Article III courts. This is especially pertinent because for an equally long period it has been recognized that matters arising outside the confines of Article III judicial power may not be assigned to an Article III court. *Hayburn's Case,* 2 Dall. 409 (1792), *Hodgsan* v. *Bowerbank,* 9 U. S. (5 Cranch) 303 (1809); *Gordon* v. *United States,* 117 U. S. 697 (1869). Thus, the fact that since the time of the Constitution Article III courts have been exercising the bankruptcy power is utterly inconsistent with the assertion that the power to adjudicate bankruptcy matters can be outside Article III. Over a hundred and fifty years after *Hayburn's case,* six of the nine justices in *Tidewater, supra,* firmly agreed with this proposition.

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[11] Justice Frankfurter joined by Justice Reed, dissenting as to the judgment but whose views on this point were approved by Chief Justice Vinson and Justice Douglas, concluded that bankruptcy jurisdiction, summary and plenary, clearly "arose under" federal law:

> That a particular claim disassociated from the fact of bankruptcy would have to be brought in a state court for want of any ground of Federal jurisdiction is irrelevant. This is so because in the exercise of its powers to "pass uniform laws on the subject of bankruptcies" Congress may deem it desirable that the Federal courts be utilized for all the claims that pertain to the bankrupt estate whether in the Federal court in which the bankruptcy proceedings is pending or in a more convenient Federal court. The congeries of controversies thus brought into being by reason of bankruptcy may be lodged in Federal court because they arise under 'the laws of the United States', to wit, laws concerning the 'subject of bankruptcies'." 337 U.S. at 652 n. 3.

Nor does the court's power to hear so-called "plenary" suits in bankruptcy stand on a different footing. Although many matters denominated "plenary" under the 1898 Act, such as the claim of Northern Pipeline in the present case, involve issues of state law, they fall within the federal-question provision both because the trustee's authority is a federal ingredient in each instance (*cf. Osborn* v. *Bank of the United States,* 22 U. S. (9 Wheat.) 738 (1824)) and, as Justice Frankfurter said in the excerpt from *Tidewater* quoted above, because they are ancillary to the federal issue of whether to grant a discharge (*cf. United Mine Workers* v. *Gibbs,* 383 U. S. 715, 86 S. Ct. 1130 (1966)). If plenary matters were not within Article III, the District Court could not have been authorized to hear them at all.[12]

Thus, the *Tidewater* decision leaves no doubt that both summary and plenary bankruptcy proceedings "arise under" Article III.[13]

Incontestably, therefore, the new bankruptcy courts fill all the requirements for Article III courts. They are inferior courts armed with full judicial powers across a broad range of subject matters normally a part of the business of the federal district courts. They exercise the judicial Power of the United States

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[12] The government misconstrues the relevance of consent to plenary jurisdiction under the old Act and *Schumacher v. Beeler,* 293 U.S. 367, 55 S. Ct. 230 (1934). (Br. U.S. at 32, 44-45). In those plenary cases, subject matter jurisdiction under Article III already existed in the federal courts by virtue of the doctrine of *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738 (1824). Congress, however, chose to limit the exercise of plenary jurisdiction to cases where the defendant consented. See also *Williams v. Austrian,* 331 U.S. 642, 67 S. Ct. 1443 (1947).

[13] The fact that the Act "confers" jurisdiction upon the District Courts and immediately transfers it to the bankruptcy courts emphasizes that it is "the judicial Power of the United States" under Article III which is vested in these courts, and not some other kind of power.

with respect to matters "arising under" federal law, i.e. the bankruptcy laws. The Constitution therefore requires that the judges of these courts hold their offices with the tenure and salary set out in Article III, Section 1.[14]

II. NO DECISION OF THIS COURT HAS EVER UPHELD THE VESTING OF ARTICLE III POWER IN A COURT LACKING ARTICLE III'S TENURE AND SALARY PROTECTIONS

A. The Government's Argument Would Destroy Article III.

As two Justices of this Court have recently stated:

> Congress has never attempted to displace Art III courts when laws of nationwide applicability were involved, and nothing in our prior decisions suggest that it may constitutionally do so. *United States* v. *Raddatz*, 447 U.S. 667, 706, 100 S.Ct. 2406 (1980) (dissenting opinion of Marshall, J., joined by Brennan, J.)

The Bankruptcy Reform Act of 1978 would accomplish precisely this forbidden end.

The government argues to sustain this extraordinary enactment that the judiciary article, Article III, is mandatory, if at all, only as to diversity cases (Br. U.S. 22), and that Congress in the exercise of its Article I powers may create courts free of Article III's requirements whenever it feels a need to do so.

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[14] We disregard the obvious sham of conferring the jurisdiction upon the district courts and then providing that the bankruptcy courts "shall exercise all of the jurisdiction conferred by this section on the district courts" (28 U.S.C. § 1471(a) and (b)), and the transparent sham of referring to the bankruptcy courts as "adjuncts" of the district court (28 U.S.C. § 151(a)). *See 2 Collier on Bankruptcy* ¶ 2.01[c] at 29 (1980) ("It is quite doubtful that this bit of legerdemain will overcome any extant Constitutional prohibitions.") The district courts have no supervisory authority or power over the bankruptcy court's personnel, or any other power which would lend minimal plausibility to these devices.

Article I, Section 8, similar to other parts of the Constitution (see *e.g.* Article IV, Sections 1, 3 and 4; Amendments 13-16, 19, 23-24, 26), enumerates numerous powers of Congress to enact laws, including, for example, the specific grant of power to regulate commerce.[15] Why the government's formulation is limited to "Article I" powers is not apparent. Nevertheless, by the government's reasoning, Congress could provide for the adjudication, for example, of all cases arising under laws enacted by it under the commerce clause, by judges and courts not qualified under Article III.

The government does not attempt to limit the sweep of the principle which it asserts. It only states, without attempt to rationalize it, that "the power to create specialized Article I courts does not mean that Congress can replace the independent Article III inferior federal judiciary by a *wholesale* assignment of federal judicial business to legislative courts" (Br. U.S. 22-23) (emphasis added). The suggestion is that piecemeal replacement is authorized.

We respectfully submit that this is a startling and an insupportable premise; that although the reach of the judicial article (Article III) is not co-extensive with all federal powers, where it was intended to function, *all* of the powers of Congress specified in Article I and elsewhere are subject to it. The contrary proposition would be subversive of the basic principles of our system: namely, the assurance to the states that within their realm the federal government shall have an independent, protected judiciary.[16]

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[15] Neither the bankruptcy nor the commerce powers are exclusive. States may legislate in these areas to the extent not inconsistent with a federal enactment. *Sturgis v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

[16] The lack of any constitutional basis for the bankruptcy courts was recognized by the only Congressional Committee to study the constitutional issue in depth:

> In sum, the Constitution suggests that an independent bankruptcy court must be created under Article III. Article III [illegible] the

(Footnote continued on following page.)

B. The Precedents Relied on By the Government Do Not Infringe Article III and Cannot Support the Bankruptcy Act's Emasculation of Article III.

The arguments advanced in support of the bankruptcy courts rely on supposed analogy to other instances in which nontenured courts are permitted or have been permitted to adjudicate matters that could, but need not be, vested in Article III courts.

The sharp contrast between those instances and what has been attempted in the bankruptcy courts is apparent when the historic purposes of Article III are considered. Those purposes were twofold: (1) to limit federal power as against the sovereignty of the states and (2) to separate from each other the exercise of federal powers that were distinctively judicial, executive, and legislative, respectively.

As to the first objective, (1) the jurisdiction of the Federal courts in the United States was limited to the types of controversies specifically enumerated, leaving the rest to the states; and (2) Congress was not required to exercise this jurisdiction nor to establish inferior federal courts, but could leave such matters to the state courts to adjudicate. The delegates in Philadelphia were not concerned that federal judicial power be exercised at all by inferior Federal courts, but they were very concerned that, if it were, it should only be exercised so as to protect state sovereignty from the misuse of judicial power at the federal level.

Thus the structure of the Constitution reflects the Framers' twin paramount concerns; that *within the states* the "judicial Power of the United States," as with the executive and legislative powers, be limited and defined, and that the essential

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(Footnote continued from preceding page.)

constitutional norm, and the limited circumstances in which the courts have permitted departure from the requirements of Article III are not present in the bankruptcy context. Even if they were present, the text of the Constitution and the case law indicate that a court created without regard to Article III most likely could not exercise the power needed by a bankruptcy court to carry out its proper functions.

House Report at 39.

"judicial Power of the United States" not overreach and infringe upon the executive and legislative, nor they with the other. Article III was not concerned with the exercise of federal power *outside* the states, nor with the exercise of power not inherently and imperatively *judicial.* Given this predicate, the prior decisions of this Court are wholly consistent with Article III.

As to the second objective, the plain intent of Article III was to insure that "cases and controversies"—i.e. traditional judicial business—if adjudicated in federal tribunals, would be in courts absolutely protected against executive and legislative influence.

1. The Existence of Non-Tenured State Courts Is Irrelevant.

The government appears to argue that because Congress may leave to state courts the adjudication of matters within Article III, it follows that Congress may vest Article III jurisdiction in non-Article III courts. (Br. U. S. 15.) The argument is a non-sequitur and if accepted would totally subvert the purposes of Article III.

The identical argument was advanced by the government in *United States* v. *Raddatz,* 447 U. S. 667, 100 S. Ct. 2406 (1980), and was not the basis for this Court's decision in that case. The argument was fully answered in the opinion of two members of the Court:

> [T]he argument misconceives the intentions that underlay the constitutional compromise embodied in Article III. The Framers were especially concerned about the possibility of an alliance between federal judges and the Congress. For this reason, they ensured that federal judges would be isolated from the legislative branch of the Federal Government and protected from congressional reprisal. State courts were perceived as necessarily independent from the Federal Government and as a relatively reliable buffer against its excesses. No such assurance would be possible with respect to federal judges unprotected by the provisions of Article III. It follows from those assumptions that under Article III, Congress is generally prohibited from creating specially accountable federal

tribunals but at the same time is permitted to entrust issues of federal law to state tribunals.

United States v. *Raddatz*, 447 U. S. 667, 705 n. 6, 100 S. Ct. 2406 (1980) (Justices Marshall and Brennan, dissenting). As Justices Marshall and Brennan stated, such a view "would render the requirements of Article III practically meaningless." *Ibid.*

2. The Attempted Analogy to "Legislative Courts" Cannot Support the Vesting of Judicial Power in the Bankruptcy Courts.

a. Territorial Courts and the District of Columbia.

The establishment of non-Article III courts in the territories of the United States does not involve the vesting of the judicial power defined by Article III, or the exercise of the power of Congress to create inferior tribunals pursuant to that Article. As explained long ago by Chief Justice Marshall in *American Insurance Co.* v. *356 Bales of Cotton (Canter)*, 26 U. S. (1 Pet.) 511 (1828), those courts have been created by virtue of Congress' pervasive power over the territories, flowing from the total sovereignty that is both inherent in the federal government and expressly conferred on Congress by Article IV, § 3. These powers are not limited by the separation of powers, but only by the fundamental individual rights found in the Bill of Rights. *See, e.g., Balzac* v. *Porto Rico*, 258 U. S. 298, 42 S. Ct. 393 (1922); *Downes* v. *Bidwell*, 182 U. S. 244, 21 S. Ct. 770 (1901); *Dorr* v. *United States*, 195 U. S. 138, 24 S. Ct. 808 (1904). Subject to such rights, Congress could provide for the adjudication of such cases by the Governor or an executive council. As Chief Justice Marshall stated in *Canter:* "In legislating for [the territories], Congress exercises the combined powers of the general, and of a state government." 26 U. S. (1 Pet.) at 546. *See also United States* v. *Coe*, 155 U. S. 76, 15 S. Ct. 16 (1894) (territory of Arizona); *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 19 S. Ct. 722 (1899) (Indian Territory); *In re Ross*, 140 U. S. 453, 11 S. Ct. 897 (1891) (consular court in China).

The same principle supports the creation of non-Article III courts in the District of Columbia. *United States* v. *Palmore*,

411 U. S. 389, 93 S. Ct. 1670 (1973). Relying upon the territorial-courts precedents. this Court held in *Palmore* that the local courts established by Congress in the District of Columbia were created "pursuant to the plenary Art I power to legislate for the District of Columbia . . . and to exercise the 'powers of . . . a State government in all cases where legislation is possible." 411 U. S. at 407. The Court was careful to distinguish the previous District of Columbia courts involved in *O'Donoghue* v. *United States,* 289 U. S. 516 (1933), which held such courts to be entitled to Article III protection, on the ground that those courts had authority "over all those controversies, civil and criminal, arising under the Constitution and the statutes of the United States and having nationwide application." 411 U. S. at 405-06. Whether Congress could vest the latter power in a non-Article III court in the District of Columbia was not passed on in *Palmore,* for Congress had made no such attempt; it had preserved Article III courts in the District "for consideration of those constitutional and statutory matters of general concern that so moved the Court in *O'Donoghue.*" 411 U. S. at 407.

Just as the issue presented in *Palmore* was "a far cry from *O'Donoghue*" (411 U. S. at 406), so this case is a far cry from anything decided in *Palmore* or the earlier territorial-court cases.

The government ignores the distinction, carefully articulated in the *Palmore* opinion, between local matters and laws of nationwide applicability. It relies (Br. U. S. at 21, *et passim*) on a *partial* quote from this Court's opinion that the protections prescribed in Article III "must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment".[17] The omitted

[17] The whole quote is that:

> requirements of Art III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment. 411 U.S. at 408.

As shown previously, the bankruptcy courts are not even limited to any "specialized" area nor do they centralize bankruptcy cases, so even the partial quote is not satisfied.

portion of the quote makes clear that this Court did not intend to provide Congress with a wide-open license to emasculate the judicial article of our Constitution. On the contrary, the Court, in the same sentence, makes clear that the requirements of Article III are inescapably "applicable where laws of national applicability and affairs of national concern are at stake". (411 U. S. at 408).

The bankruptcy laws are obviously such laws; they are nationwide and not confined to a geographical area; they are "uniform", as the Constitution requires, "throughout the United States" (Section 8, Clause 4); and they are of national concern. Nothing in *Palmore* authorizes the Bankruptcy Reform Act's destruction of Article III within the states.

b. Matters Committed to Other Branches: the Court of Claims and Customs Court.

The government erroneously seeks justification for the bankruptcy courts in the decisions holding that the former Court of Customs and Patent Appeals and Court of Claims were not Article III courts. *Ex parte Bakelite,* 275 U. S. 438, 49 S. Ct. 411 (1929); *Williams* v. *United States,* 289 U. S. 553, 53 S. Ct. 751 (1933).

Those decisions provide no basis for the assumption that the judicial power of Article III may be vested in a non-tenured court. They rest, rather, on the fact that the matters committed to those courts did not necessarily fall within the judicial power, as defined in Article III, at all. As stated in *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 59 U. S. (18 How.) 272, 284 (1856), on which *Ex parte Bakelite* relied:

> There are matters, involving *public rights,* which *may* be presented in such form that the judicial power is capable of acting on them, and which are *susceptible* of judicial determination, but which Congress *may or may not* bring within the cognizance of the courts of the United States, as it may deem proper. (Emphasis added.)

Consonant with that principle, the Court in *Bakelite* reasoned that the determinations committed to the Court of Customs and Patent Appeals were "matters, arising between the government and others" which included "nothing which

inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, *committed exclusively to executive officers." Id.*, at 458 (emphasis supplied). Consequently, Congress could also repose such determinations in a non-tenured "legislative" court. The same principle was followed in *Williams* v. *United States, supra.* See also *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission,* 430 U. S. 442, 455, 97 S. Ct. 1261 (1977).[18]

This distinction makes eminent sense in terms of the purposes of Article III, for the claim of a right to a decision uninfluenced by Congress or the Executive is obviously less compelling when those branches could have made the decision in the first place. Thus the basis of *Murray's Lessee* and *Bakelite* was that Congress could leave the customs matters to a nontenured court because it could have, and historically always had, sidestepped the courts altogether.[19]

Nothing of the sort can be said of the jurisdiction conferred on the bankruptcy courts. Bankruptcy cases, in respect of the type of issues here involved, are not controversies "between the government and others", but rather are private litigations involving private rights between private parties. As the govern-

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[18] *See* Katz, *Federal Legislative Courts,* 43 Harv. L. Rev. 894, 916-17 (1930): "The only matters which the *Bakelite* doctrine permits to be taken from the constitutional courts and vested in legislative courts are those which Congress could, apart from that decision, commit to final determination of executive officers". As Justice Van Devanter wrote for the Court in *Bakelite,* in such cases, "Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals"—and it may vest it in "legislative courts" not subject to the restrictions of Article III. (*Id.* at 451).

[19] Thus as the Court in *Murray's Lessee* pointed out:

> "We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the laws of the land, a summary method for the recovery of debts due to the Crown, and especially those due from the receivers of the revenue." *Id.* at 277.

ment concedes, "[b]ankruptcy proceedings primarily concern the relationship between an insolvent debtor and his creditors". (Br. U.S. 33-34).

The government attempts to avoid this unmistakable principle by arguing that "bankruptcy proceedings involve the conferral of a public benefit and implicate the public interest in a way that ordinary suits between private litigants do not". (Br. U. S. at 34). The "public benefit" to which the government refers is "[t]he discharge in bankruptcy of a debtor's obligations". (*Id.*) But it is not the grant or denial of a discharge, or the approval of a plan of reorganization or composition, that is in issue here. We are here concerned with the adjudication of private rights. The effort to assimilate this "benefit" to the "public rights" involved in *Bakelite* or *Murray's Lessee* is nothing but a play upon words. In this sense, *every* private adjudication results in a "public benefit . . . conferred by the government"—a judgment that fixes the rights of the parties and, in effect, may discharge a party from the claims of his adversary.

To be sure the decision to grant or deny a discharge or approve a plan need not be considered as an exercise of judicial power; conceivably this function could be vested in a non-judicial, non-Article III agency. But the adjudication of private rights as provided by the Act and involved here is plainly an exercise of judicial power which, if vested by Congress in a federal court, may be vested only in an Article III court.

c. Military Courts.

For similar reasons, it is equally clear that military courts are not vested with judicial power as defined in Article III. They are created by virtue of the historic and fundamental sovereign power over the military, vested by the Constitution in the President as Commander in Chief and in the Congress. The basis for such courts was explained by this Court very early in *Dynes* v. *Hoover*, 61 U. S. (120 How.) 65, 79 (1858), where the Court in dictum upheld the trial of servicemen by *ad hoc* courts-martial: "Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then

and now practiced by civilized nations; . . . *the power to do so is given without any connection between it and the 3d article of the Constitution. . . .*" (emphasis supplied).[20]

Moreover, this Court has carefully and narrowly confined the jurisdiction of the military courts. In *United States ex rel. Toth* v. *Quarles,* 350 U. S. 14 (1955), it held unconstitutional an attempt to extend the jurisdiction of such courts beyond those persons actually in, or convicted while in, military service; it held that an Act of Congress providing for such extension of military court jurisdiction "necessarily encroaches on the jurisdiction of federal courts set up under Article III. . . ." (*Id.,* at 15-16). Similarly, in *O'Callahan* v. *Parker,* 395 U. S. 258 (1969), this Court held that military courts could not exercise jurisdiction over non-service connected crimes committed by a serviceman.

Clearly, these cases do not support the government's position in this case.

3. The Attempted "Analogy" to Administrative Agencies Does Not Support the Bankruptcy Courts.

The government suggests that since some administrative agencies perform "adjudicatory functions", it follows that Congress may create non-Article III courts to adjudicate all issues, including the types of issues involved in this case. But as has been recognized at least since the decision in *Murray's Lessee, supra.,* 59 U. S. (18 How.) at 280-81, not all "adjudicatory functions" are necessarily exercises of "judicial power"; preliminary determinations of fact and law, without coercive or enforcement power, may in appropriate settings fall within the executive or legislative domain. As the government recognizes, however (Br. U. S. at 33-34), the "adjudicatory" functions of administrative agencies are limited. Such agencies are not the delegates of a roving commission to try cases and enforce their judgments; in fact they may not constitutionally do so. *ICC* v.

[20] The Court reaffirmed this conclusion as recently as 1971. *Relford v. Commandant,* 401 U.S. 355 (1971).

Brimson, 154 U. S. 447, 485, 14 S. Ct. 1125 (1894).[21] Thus in *Crowell* v. *Benson*, 285 U. S. 22, 52 S. Ct. 285 (1932), the subject matter was a federally created right to workmen's compensation; the administrative agency's authority was narrowly confined; the agency had no power to enforce its own award; its authority was to investigate and to make factual findings and determine the amount to be paid under the statute's formula—resort was required to the Article III courts for enforcement. The agency could not even finally decide that it had jurisdiction of the parties—in fact, this Court decided that the District Court had properly held a *de novo* hearing and set aside the agency's award, on the "fundamental" or "constitutional" issue of whether a master-servant relationship existed. (*Id.* at 65).[22] By contrast, the non-Article III judges and courts under the 1978 Act are given full judicial power to decide controversies and to enforce their orders, and the bankruptcy court's decision to take jurisdiction of litigation "is not reviewable by appeal or otherwise". (28 U. S. C. § 1478(b)). These are not like the powers of administrative agencies; they are judicial in form and fact.

Moreover, not only do administrative agencies not exercise "judicial power" including the power to enforce judgments, but also there are limits on the power of administrative agencies to function where "public rights" involving matters "between the government and others" are not involved. This Court recently had occasion to reaffirm this point by reference to the distinction earlier pointed out in *Murray's Lessee:*

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[21] As this Court held in *Brimson*, an administrative agency "could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of a fine or imprisonment." *Id.*, at 485.

[22] Chief Justice Hughes, for the Court, stated that to allow Congress to "substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend, . . . would be to sap the judicial power as its exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts. . . ." (*Id.* at 56-57).

> "Our prior cases support administrative fact-finding in only those situations involving 'public rights,' *e.g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases are not at all implicated." *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455, 97 S.Ct. 1261, 1270 (1977).[23]

The decisions of this Court provide no basis for assuming that an administrative agency could be vested with the vast authority which is vested in the bankruptcy "judges" by the Bankruptcy Act of 1978 to decide cases ranging over the entire *corpus juris*.

In the final analysis, however, it is unnecessary and irrelevant to consider whether Congress could constitutionally employ an administrative scheme rather than a federal court for the adjudication of bankruptcy matters and, if so, on what terms. The plain fact is that Congress has not done so. It has expressly vested the bankruptcy jurisdiction here initially in the Article III district courts, 28 U. S. C. § 1471(a)(b), although in a sleight of hand this jurisdiction is immediately delegated to the new bankruptcy courts. §§ 1471(c)(e). By so doing Congress has sought the advantages of reposing bankruptcy jurisdiction in a court endowed with all the attributes of an Article III court save only the guarantee of tenure and compensation. The plain meaning of Article III is that if Congress

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[23] The Court in *Atlas Roofing Co.* repeatedly emphasized the distinction drawn in *Murray's Lessee* and repeated in *Crowell v. Benson, supra*, "between cases of private right and those which arise *between the Government and all persons subject to its authority.*" *See Atlas Roofing Co., supra*, 430 U.S. at 452, 454-56, 458. Although *Crowell* itself did involve a case of private rights, significantly, the Court in *Atlas* made only footnote reference to that circumstance and explained it as follows: "In cases which do involve only 'private rights,' this Court has accepted fact-finding by an administrative agency, without intervention by a jury, *only as an adjunct to an Article III court*, analogizing the agency to a jury or special master [citing Crowell]." 430 U.S. at 450 n. 7. (emphasis supplied). Although Congress has attempted to characterize the Bankruptcy Courts as an "adjunct" to the district courts (28 U.S.C. § 151(a)), clearly they are independent courts, not "adjuncts."

elects to vest judicial power in an "inferior court" it must do so in a court having the attributes prescribed by Article III.[24]

4. The Right of Appeal Does Not Cure the Constitutional Defect.

It would seem beyond the necessity of argument that the mere fact that there is a right of appeal to an Article III court does not avoid the constitutional requirement that the court of first instance, if otherwise subject to Article III's provisions, must comply with Article III. If it were otherwise, all district courts of the United States could be constituted with judges appointed for a term of years with compensation subject to diminution. The argument is "a frontal assault on the constitutional requirements of tenure and salary protection for 'Judges, *both* of the supreme and inferior Courts'". Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional*, 70 Geo. L. J. 297, 307 (1981). The fact that there is an appeal to an Article III court does not avoid the constitutional imperative that *all* courts, and not just appellate courts, exercising the "judicial Power of the United States" must be constituted in accordance with its provisions, nor does it provide the practical assurance of an impartial trial.[25] *See also United States* v. *Raddatz*, 447 U. S. 667, 100 S. Ct. 2406 (1980) (*de novo* review under Magistrates' Act discussed).

5. The Uncontrolled Delegation of Article III Power to the Bankruptcy Courts Cannot Be Reconciled With *United States* v. *Raddatz*.

In *United States* v. *Raddatz*, 447 U. S. 667, 100 S. Ct. 2406

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[24] Similarly, the Seventh Amendment requires that if Congress elects to use judicial means for enforcing rights it creates, the right to jury trial attaches. *Curtis v. Loether*, 415 U.S. 188, 94 S.Ct. 1005 (1974).

[25] As this Court said long ago: If the safeguards of the federal judiciary operate only on appeal, litigants "will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal." *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 833 (1824).

(1980), this Court clearly indicated the protections which must be available in order to render a delegation of Article III judicial power to untenured personnel constitutional. Although *Raddatz* held by a narrow (5-4) majority that the District Court was not required to rehear the witnesses in ruling on a pre-trial suppression motion referred to a magistrate, it did so in terms that unmistakably set narrow limits to the delegation of functions from an Article III court to a non-Article III official. The Court emphasized that under the Magistrates Act "the district court judge alone acts as the ultimate decisionmaker" and that "The entire process takes place under the district court's total control and jurisdiction." 447 U. S. at 681. Because the statute provided that the magistrate's proposed findings and recommendations were to be subject to *de novo* redetermination by the judge, "who then exercises the ultimate authority to issue an appropriate order," *id.* at 682, this Court concluded that such a limited delegation does not violate Article III.

Four justices in *Raddatz* were of the view that delegation to a non-Article III officer of the power to hear witnesses, without a *de novo* rehearing by an Article III Judge, violated the Constitution. That delegation was approved by a narrow margin only because effective control over the matter remained with the Article III Judge. As the concurring Justice (Blackmun) observed:

> Although Mr. Justice Marshall [in dissent] ably argues that this characterization of the magistrate procedure clashes with Article III, I am not persuaded. As the Court observes, the handling of suppression motions invariably remains completely in the control of the federal district court. The judge may initially decline to refer any matter to a magistrate. When a matter is referred, the judge may freely reject the magistrate's recommendation. He may re-hear the evidence in whole or in part. He may call for additional findings or otherwise "recommit the matter to the magistrate with instructions." . . . Moreover, the magistrate himself is subject to the Article III judge's control. Magistrates are appointed by district judges, § 631(a), and subject to removal by them, § 631(i). In addition, district judges retain plenary authority over when, what, and how many pretrial matters are assigned to magistrates . . . Thus the only conceivable danger of a